IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	))))))))))	Case No. 4:05-cv-00329-GKF-PJC

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 1 AND 2 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

SECONDARY SOURCES

Pursuant to Fed. R. Civ. P. 56(a), Defendants respectfully move for summary judgment on Counts 1 and 2 of the Second Amended Complaint, Dkt. No. 1215 ("SAC"), which seek to recover response costs and natural resource damages under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). For over three years, Plaintiffs have struggled to force the square peg of this lawsuit, alleging over-fertilization of unidentified hay pastures by farmers and ranchers operating at disparate locations across a million-acre watershed, into the round hole of CERCLA, which addresses releases of hazardous substances from identifiable locations by identifiable sources. Now that discovery has been substantially completed, the undisputed facts make clear that Plaintiffs' CERCLA claims fail.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Illinois River Watershed ("IRW") comprises approximately 1,069,530 acres, located half in Oklahoma (approximately 576,030 acres), and half in Arkansas (approximately 493,500 acres). *See* SAC ¶ 21; SAC Ex. 1. The IRW encompasses portions of six counties (two in Arkansas and four in Oklahoma) as well as at least thirteen cities and towns. *See id.*

2. The IRW encompasses thousands of separately-owned parcels of real property dedicated to a wide array of retail, transportation, industrial, residential, agricultural, educational, public, religious, cultural and recreational uses. *See* Ex. 1 at 28-29.

3. Plaintiffs alleged that poultry litter contains: "phosphorus / phosphorus compounds; nitrogen / nitrogen compounds; arsenic / arsenic compounds; zinc / zinc compounds; copper / copper compounds; hormones; and / or microbial pathogens." SAC ¶ 57.

4. Notwithstanding Plaintiffs' allegations, the only evidence of alleged "injuries" or "response actions" is limited to phosphorus compounds and bacteria. Fisher Dep. at 451:7-11, 516:9-17, 615:4-616:19 (Ex. 2) ("[T]he only contaminants of concern [to Plaintiffs] in the [IRW]

are phosphorus and bacteria."). Neither heavy metals, nor arsenic, nor estradiol was included in Plaintiffs' remediation considerations. *See* King Dep. at 69:20-71:3, 81:21-25 (Ex. 3).

5. Plaintiffs claims for "natural resource damages" are limited to "injuries" allegedly resulting from "the effects of excess phosphorus on water quality in the Illinois River system." Ex. 4 at 1:3-4 ("[T]he Team considered only the aesthetic and ecosystem effects resulting from excess phosphorus."); Ex. 5 at 1 (same).

6. Neither "microbial pathogens," "bacteria" nor "phosphorus compounds" are listed on EPA's "Hazardous Substances List." *See* 40 C.F.R. § 302.4.

7. Elemental phosphorus is a highly reactive substance used to make fireworks and napalm. *See* Ex. 6 § 4.3 at 154. It can be manufactured, but it does not occur naturally in the environment and does not occur in poultry litter. *See* Ex. 7 at 5; Ex. 8 at No. 10 ("Poultry litter does not contain elemental phosphorus. . . . Admitted.").

8. Poultry litter contains phosphorus compounds known as orthophosphates (*i.e.*, PO_4 or P_2O_5). *See* Ex. 9 at 1.

9. Phosphorus compounds such as PO_4 or P_2O_5 are among the most common substances in nature, and are essential nutrients found in thousands of human food products. *See* Ex. 10.

10. The phosphorus compounds present in poultry litter are common components of plant fertilizers. *See* Ex. 7 at 2 ("Poultry litter contains each of the sixteen nutrient elements that are essential for plant growth: carbon (C) , hydrogen (H), oxygen (O), nitrogen (N), phosphorus (P), potassium (K), calcium (Ca), magnesium (Mg), sulfur (S), iron (Fe), boron (B), manganese (Mn), zinc (Zn), copper (Cu), molybdenum (Mo), chlorine (Cl)").

11. Animal manures have been used as fertilizer for thousands of years. *See* Ex. 11 at 7.

12. Poultry litter is and has been applied as a fertilizer in the IRW for the past fifty years or

more. *See* Ex. 8 at No. 233.

13. Poultry litter is widely recognized as a beneficial and effective fertilizer. *See, e.g.*, P.I.T. at 1764:23-1768:9 (Testimony of Dr. Frank Coale) (Ex. 12).

14. The State of Oklahoma recognizes poultry litter as an effective fertilizer, and actively encourages and approves of its use. *See* Ex. 9 at 1 ("Applying animal manure to farmland is an appropriate and environmentally sound management practice for livestock and poultry producers. Land applications recycle nutrients from manure to soil for plant growth and add organic matter to improve soil structure, tilth, and water holding capacity."); Ex. 13 at 1 ("Poultry Litter is an excellent, low cost fertilizer if used properly. Land Application of litter returns nutrients and organic matter to the soil, building soil fertility and quality.").

15. Poultry litter provides soil nutrients, increases crop yields, and even outperforms commercial fertilizers. *See* Ex. 13 at 2 ("Poultry litter not only increased forage yields but also increased protein content over control and commercial fertilize plots. Higher yields and protein content . . . may result from the fact that litter provides a slow release nitrogen fertilizer, improves soil quality, and reduces soil acidity."); Ex. 11 at 7-8.

16. The use of poultry litter as a fertilizer is authorized and comprehensively regulated by Oklahoma and Arkansas law. *See* 2 Okla. Stat. § 10-9.1 *et seq.* (Registered Poultry Feeding Operations Act); 2 Okla. Stat. § 10-9.13 *et seq.* (Oklahoma Poultry Waste Transfer Act); 2 Okla. Stat. § 10-9.16 *et seq.* (Oklahoma Poultry Waste Applicators Certification Act); Okla. Admin. Code § 35:17-5-1, *et seq.* (regulations implementing Registered Poultry Feeding Operations Act); Ark. Code Ann. § 15-20-901, *et seq.* (Poultry Feeding Operations Registration Act); Ark. Code Ann. § 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et*

seq.; ANRC Reg. 2201.1, *et seq.*

17. Poultry litter is applied in the IRW in conformance with Oklahoma and Arkansas laws and regulations. *See, e.g.*, P.I.T. at 1301:6-1303:8 (Testimony of Jesse Randall Young) (Ex. 12); *id.* at 2002:7-14; 2006:12-15 (Testimony of John Littlefield); Littlefield Dep. at 23:19-21 (Ex. 14); *id.* at 43:3-11; Phillips Dep. at 63:18-23 (Ex. 15). There is no evidence in the record that the application of poultry litter in the IRW violates Oklahoma or Arkansas laws and regulations.

18. There is no evidence in the record that the application of poultry litter in the IRW deviates from common agricultural practice.

19. The vast majority of the acreage in the IRW has never had poultry litter (nor the alleged hazardous substances Plaintiffs allege come from poultry litter) deposited, stored, disposed of, placed, or located on that property. *See* Engel Dep. at 69:19-24 (Ex. 16).

20. Plaintiffs have not identified or provided evidence to identify each location within the IRW to which poultry litter has been applied or its constituents have come to be located.

21. Plaintiffs have not identified or provided evidence to identify each location from which alleged "releases or threatened releases" of hazardous substances have occurred or where such hazardous substances have come to be located.

22. Plaintiffs could have identified the areas or parcels of land within the IRW allegedly impacted by the deposition, storage, disposal, placement or migration of the hazardous substances alleged in the SAC, and separated those areas or parcels of land from areas or parcels of land not impacted, but they choose not to do so.

LEGAL STANDARD

Summary judgment is appropriate where the pleadings, discovery and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary judgment is not a 'disfavored

procedural shortcut;' rather, it is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

The moving party is entitled to summary judgment where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322-23. Where the movant demonstrates an "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (requiring non-moving party to provide admissible evidence "on which a jury could reasonably find for the plaintiff"); *Matsushita v. Zenith*, 475 U.S. 574, 586 (1986) ("[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts"). Sufficiency of the evidence will turn on whether it presents a "disagreement [that] require[s] submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

ARGUMENT

I. PLAINTIFFS' CERCLA CLAIMS ARE NOT BASED ON "HAZARDOUS SUBSTANCES" AS REQUIRED BY CERCLA

Plaintiffs seek to recover damages and response costs for environmental injuries in the IRW allegedly caused by the release or threatened release of "hazardous substances" within the meaning of CERCLA. SAC ¶¶ 51-52, 57-61. However, Plaintiffs' experts' reports and depositions of those experts make clear that Plaintiffs' case is premised on alleged injuries related to nutrients (namely orthophosphates) and bacteria, which are not CERCLA hazardous

substances. Because Plaintiffs have not identified a single injury to natural resources or a single response action by the State of Oklahoma that was caused by the release or threatened release of a CERCLA hazardous substance, Counts 1 and 2 should be dismissed as a matter of law.

A. Plaintiffs' Alleged Injuries Relate Exclusively to Bacteria and Orthophosphates

Cognizant that orthophosphates contained in poultry litter are not "hazardous substances," Plaintiffs allege that poultry litter contains a variety of other materials included on EPA's Hazardous Substances List. Specifically, they assert that poultry litter contains: "phosphorus / phosphorus compounds; nitrogen / nitrogen compounds; arsenic / arsenic compounds; zinc / zinc compounds; copper / copper compounds; hormones; and / or microbial pathogens." SAC ¶ 57. Plaintiffs' expert, Dr. Roger Olsen, further alleges that poultry litter contains a variety of specific chemicals, including radionuclides and phosphoric acid, which are supposedly included on EPA's Hazardous Substances List. *See* Ex. 17 at § 6.4.3.5.[1] Moreover, he alleges that EPA's list includes not only these specific chemicals, but also all "compounds," "forms," and "combinations" of the listed chemicals, a collection that could run to the thousands. Ex. 17 at § 6.4.3.5. However, Plaintiffs' allegations with respect to these other substances cannot give rise to CERCLA liability because Plaintiffs and their experts have failed to provide any evidence, beyond mere allegations, of any potential injury or response action caused by any release or threatened release of these substances into the IRW. *See* 42 U.S.C. § 9607(a).

As a threshold matter, Plaintiffs did not test for many of the substances contained in Dr.

[1] Dr. Olsen's list includes: "Ammonia (CASRN 7664417), Ammonia and Compounds, Arsenic and compounds, Cadmium and compounds, Copper and compounds, Lead and compounds, Manganese compounds, Nickel and compounds, Nitric Acid (CASRN 7786-81-4), Nitrogen oxides, Nitrosamines, Phosphorus and compounds, Phosphoric acid (CASRN 7664382), Polynuclear aromatic hydrocarbons, Radionucleotides [sic], Selenium and compounds, Sulfuric acid (CASRN 7664939), Thiourea (CASRN 62566), Unlisted hazardous waste with characteristic of reactivity, Zinc and compounds." *Id.*; *see also* Ex. 18 at No. 9 (same list plus "Iron compounds").

Olsen's list of alleged hazardous substances and thus do not know whether those substances can be found in the IRW's environment. For example, while Dr. Olsen claims that poultry litter contains phosphoric acid, he admits that Plaintiffs neither tested for this substance nor would have found it in the environment if they had. *See* Olsen Dep. at 193:21-198:9 (Ex. 19).[2] Moreover, while Plaintiffs analyzed poultry litter for supposedly "hazardous substances" such as ammonia, arsenic, cadmium, copper, lead, manganese, nickel, nitric acid, nitrogen oxides, selenium, thiourea, iron and zinc, Plaintiffs have identified no injury or response action caused by the release or threatened release of those substances. Plaintiffs have not offered a single expert opinion that purports to tie any injury or response cost to any substance other than phosphorus compounds and bacteria. In fact, Plaintiffs' expert Dr. Berton Fisher repeatedly confirmed during his deposition that "the only contaminants of concern in the Illinois watershed are phosphorus and bacteria." Fisher Dep. at 451:7-11, 516:9-17, 615:4-7 (Ex. 2). Accordingly, Dr. Fisher confirmed that Defendants do not need to prepare any defense with respect to the other alleged hazardous substances including "metals," "hormones," "nitrogen" or the "antimicrobial effects" of antibiotics. *Id.* at 615:4-616:19.

CERCLA imposes liability only where a release or threatened release of a CERCLA hazardous substance causes an injury or the incurrence of response costs. 42 U.S.C. § 9607; *Stewman v. Mid-South Wood Prods.*, 993 F.2d 646, 649 (8th Cir. 1993); *City of Seattle v. Amalgamated Servs., Inc.*, 1994 U.S. Dist. LEXIS 9761, at *2-3 (W.D. Wash. Mar. 4, 1994)

[2] Plaintiffs' expert Gordon Johnson also admitted that unreacted phosphoric acid cannot exist in a natural soil environment, given that it can exist only under laboratory conditions. *See* Ex. 20 at § 3(a); *see also* Ex. 7 at § 3(j) ("[U]nreacted phosphoric acid (H_3PO_4) exists only under laboratory conditions where H^+ is the only cation present. I am in agreement with Dr. Gordon Johnson's summary of the 'Behavior of Phosphorus in Soils and the Environment'" that neither elemental phosphorus nor unreacted phosphoric acid generally persist in natural soil.). Likewise, Plaintiffs did not analyze environmental samples from the IRW for their other alleged hazardous substances nitrosamines, polynuclear aromatic hydrocarbons, radionuclides or sulfuric acid.

(response costs must be caused by release of an alleged hazardous substance). Plaintiffs admit that they have failed to develop any evidence to support claims related to substances other than phosphorus compounds and bacteria. Those substances cannot give rise to CERCLA liability.

B. Bacteria and Orthophosphates are Not CERCLA Hazardous Substances

Putting aside the unsupported allegations in the SAC, Plaintiffs' CERCLA claims relate exclusively to alleged releases of bacteria and certain phosphorus compounds. Plaintiffs cite no legal authority for the proposition that bacteria are a hazardous substance under CERCLA. Therefore, their CERCLA claims can survive summary judgment only if the phosphorus compounds found in poultry litter are hazardous substances. They are not.

CERCLA defines "hazardous substance" to include only: (1) any substance designated as such under the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(2)(A); (2) "any element, compound, mixture, solution, or substance designated pursuant to" Section 102 of CERCLA, 42 U.S.C. § 9602; (3) hazardous wastes designated under the Solid Waste Disposal Act, 42 U.S.C. § 6921; (4) any "toxic pollutant" listed under the Federal Water Pollution Control Act, 33 U.S.C. § 1317(a); (5) hazardous air pollutants under the Clean Air Act, 42 U.S.C. § 7412(b)(1); or (6) "any hazardous chemical substance or mixture" under the Toxic Substance Control Act ("TSCA"), 15 U.S.C. § 2606. 42 U.S.C. § 9601(14). EPA has compiled the materials on these various lists and promulgated an omnibus listing of all CERCLA hazardous substances (the "Hazardous Substances List"). *See* 40 C.F.R. § 302.4 (identifying CERCLA hazardous substances by their unique "chemical abstract survey" ("CAS") registration number).[3] For example, the Hazardous Substances List includes elemental phosphorus (CAS #7723-14-0). In contrast, orthophosphates, the nutrients found in poultry litter, are not listed.

[3] A CAS number is a unique number assigned to only one substance. *See* Ex. 21 at 2.

Unpersuaded by EPA's precision in drafting the Hazardous Substances List, Plaintiffs admit that they assume EPA's inclusion of one element or substance on the list also includes all other compounds or mixtures which contain that element or substance. *See* Ex. 17 at § 6.4.3.5 ("Assuming the list of Hazardous Substances and Reportable Quantities (table 302.4, 40 CFR § 302.4) includes not only the specific chemical listed but also chemical compounds, chemical forms and chemical combinations of the listed chemical.").[4] Because the Hazardous Substances List includes elemental "phosphorus," Plaintiffs assume that it also includes every compound which has a phosphorus atom in its chemical structure. *See* Ex. 17 at § 6.4.3.5. This assumption, which is the foundation of Plaintiffs' CERCLA claims, is mistaken as a matter of law.

EPA has gone to great lengths to make its system of classification on the Hazardous Substances List clear. The Hazardous Substances List sets forth each substance by its unique CAS number. For example, elemental phosphorus is listed as CAS number 7723-14-0, and phosphorus pentachloride as CAS number 10026-13-8. *See* 40 C.F.R. § 302.4. The fact that EPA used individualized CAS numbers to refer to elemental phosphorus and specific phosphorus-based compounds precludes any implication that Congress and EPA intended to include other unlisted phosphorus compounds as hazardous substances. Phosphorus and phosphorus pentachloride are not the same substance, and if the former included the latter, EPA need not have listed the latter. The canon *expressio unius est exclusio alterius* instructs that where a specific list of items is provided, all things not listed are excluded. *See City of New York v. Exxon Corp.*, 766 F. Supp. 177, 182 (S.D.N.Y. 1991) ("where the table includes a group of

[4] Dr. Olsen included "not only [the] specific chemicals listed, but also chemical compounds, chemical forms and chemical combinations of listed chemicals" at counsel's guidance. Olsen Dep. at 191:21-193:7 ("Q. [Plaintiffs' counsel] just told you that if the table said [] phosphorus, that that meant phosphorus and compounds? A. . . . . He told me exactly that chemical compounds, chemical forms and chemical combinations, that list of chemicals have been determined to be hazardous substances.") (Ex. 19).

related substances, such as benzene, benyzl chloride, and benzene sulfonic acid chloride, the table does not uniformly include organizational generic headings, such as 'benzene and compounds'"); *see also Barnhart v. Peabody Coal, Co.*, 537 U.S. 149, 168 (2003); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003).

Congress and EPA know how to list an entire category of related compounds when they want to. For example, the Clean Air Act includes several group designations of hazardous air pollutants, which are incorporated into the Hazardous Substances List. *See* 42 U.S.C. § 7412(b) (listing, *inter alia*, all "Antimony Compounds," "Coke Oven Emissions," "Glycol Ethers," and "Lead Compounds"). In addition, the Hazardous Substance List contains 13 instances in which EPA listed a chemical and all of its compounds, including, *e.g.*, "ANTIMONY AND COMPOUNDS," "CHROMIUM AND COMPOUNDS" and "MERCURY AND COMPOUNDS." 40 C.F.R. § 302.4. Yet, neither Congress nor EPA has ever included any category such as "PHOSPHORUS AND COMPOUNDS" in any listing. In fact, EPA initially proposed including additional phosphorus compounds on the Hazardous Substances List (including ferric glycerophosphate, ferric phosphate, phosphorus pentaflouride, and sodium phosphate), but removed them from the proposed list after finding they did not pose imminent threats to public health and welfare. *See* 40 Fed. Reg. 59,960, 59,965-66 (proposed Dec. 30, 1975); 43 Fed. Reg. 10,474, 10,479 (Mar. 13, 1978). EPA's decision not to list all phosphorus compounds was well-founded as phosphorus compounds are among the most common in nature, and many are essential nutrients.[5] In stark contrast, elemental phosphorus is a highly reactive

[5] A recent USDA listing makes clear that phosphorus compounds are found in over 1,100 food products that we eat and discard every day, including apples, bagels, bananas, beef, breads, butter, celery, cereals, cheeses, eggs, fish, grapes, gravy, ice cream, lettuce and milk. *See* Ex. 10.

substance used to make fireworks and napalm.[6] Plaintiffs' attempted inference that all phosphorus compounds are "hazardous substances" must be rejected as a matter of law. *See, e.g., Fischer Imaging Corp. v. Gen. Elec. Co.*, 187 F.3d 1165, 1173 n.8 (10th Cir. 1999); *United States v. Oberle*, 136 F.3d 1414, 1423-24 (10th Cir. 1998).

Plaintiffs' approach is also contradicted by recent EPA guidance. After this case was filed, EPA's Office of Emergency Management and Office of Superfund Remediation & Technology Innovation distributed a guidance memorandum which unequivocally rejects Plaintiffs' view. *See* Ex. 23. The EPA memo states that "[e]lemental phosphorus and specific phosphorus and nitrogen compounds are listed hazardous substances. Elemental nitrogen, and phosphorus and nitrogen compounds other than those listed are not hazardous substances." *Id.* at 2.[7] EPA's position is entitled to deference. Where an agency issues an interpretation of its own regulations, "it is … controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).[8] Deference is particularly apt where agency expertise—here, chemistry and toxicology—is involved. *Mass. v. Blackstone Valley Elec. Co.*, 67 F.3d 981,

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[6] Elemental phosphorus exists in several chemically distinct forms. *See* Ex. 6 § 3.2 at 145. The best-known form of elemental phosphorus is white phosphorus, which burns when exposed to air. *See id.* § 1.1 at 3-4. Elemental phosphorus does not occur naturally, but is manufactured for munitions, pesticides and other chemicals. *See id.* § 4.3 at 154; Ex. 22 at 1.

[7] EPA has thus expressly rejected the position accepted by the district courts in *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1283-85 (N.D. Okla. 2003), *vacated by settlement* (July 16, 2003), and *City of Waco v. Schouten*, 385 F. Supp. 2d 595, 601-02 (W.D. Tx. 2005), which adopted the view that EPA intended to include orthophosphates on the Hazardous Substances List when the agency listed "phosphorous."

[8] *See also Barnhart v. Walton*, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency "rulings, interpretations and opinions … constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *In re Wal-Mart Stores, Inc., FLSA Litig.*, 395 F.3d 1177, 1182 (10th Cir. 2005).

992 (1st Cir. 1995) ("The judicial machinery is ill-suited to fashioning a workable rule for determining whether [a] substance [] by virtue of its chemical, structural, functional, or other qualities, falls within the properly conceived definition of [a hazardous substance]."). The determination that only specifically-listed phosphorus compounds are hazardous substances is neither plainly erroneous nor inconsistent with 40 C.F.R. § 302.4.

EPA plainly (1) knows that there are many phosphorus-based compounds; (2) knows how to differentiate between elemental phosphorus and phosphorus compounds; and (3) did not intend to include all phosphorus-based compounds in the CERCLA Hazardous Substance List simply by listing "phosphorus" and several specific phosphorus compounds. Elemental phosphorus does not naturally occur in the environment[9] and Plaintiffs admit that is not part of poultry litter.[10] It is undisputed that poultry litter contains orthophosphates rather than elemental phosphorus, and that these orthophosphates do not specifically appear on the Hazardous Substances List. Accordingly Plaintiffs' CERCLA claims must be dismissed as a matter of law.

II. PLAINTIFFS CANNOT PROVE A CERCLA-COVERED "RELEASE" BECAUSE THE ACTIVITY AT ISSUE IS THE NORMAL APPLICATION OF FERTILIZER

Even if the orthophosphates contained in poultry litter fell within CERCLA's definition of "hazardous substance," Plaintiffs' CERCLA claims would still fail because CERCLA does not reach the conduct on which their claims are based. In order to prevail, Plaintiffs must prove the "release" of a hazardous substance into the environment, which caused the incurring of response costs or injured natural resources. 42 U.S.C. § 9607(a)(4). A CERCLA "release" generally includes any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of a hazardous

[9] *See* Ex. 6 § 1.1 at 3-4.

[10] *See* Ex. 8 at No. 10 ("Poultry litter does not contain elemental phosphorus. . . . Admitted.").

substance. *Id.* § 9601(22). However, wary of a suit such as this, Congress foreclosed any assertion that CERCLA prohibits the agricultural use of fertilizer by excluding from the definition of "release" any "normal application of fertilizer." *Id.* § 9601(22)(D). The evidence is undisputed that poultry litter is applied in the IRW in a normal manner consistent with generations of agricultural practice and with state law. This practice was certainly in place well prior to the enactment of CERCLA in 1980. Nor does any evidence demonstrate that poultry litter is used differently in the IRW than elsewhere in the country. Thus Plaintiffs cannot prove that the use of litter in the IRW is anything other than the "normal application of fertilizer," and their CERCLA claims should be dismissed as a matter of law.

A. Poultry Litter is Land Applied as a Fertilizer

The undisputed facts demonstrate that poultry litter has long been recognized as a beneficial fertilizer, and has been used for that purpose in the IRW for decades.[11] *E.g.*, Undisputed Facts ¶¶ 10-17. Indeed, animal manures, including animal bedding, have been recognized as beneficial fertilizers for thousands of years. *Id*. Both Oklahoma and Arkansas specifically authorize and comprehensively regulate the use of poultry litter as a fertilizer. *See* Undisputed Facts ¶ 16; *infra* note 16. Oklahoma's poultry litter laws were enacted to "assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma." Okla. Admin. Code § 35:17-5-1; *see also* Ark. Code Ann. §§ 15-20-902(1), (2) (recognizing that "[l]itter provides nutrients that are beneficial to plant growth" and that "[t]he proper utilization of litter allows the addition of nutrients to the soil at a low cost").

[11] The term "fertilizer" refers to "[a]ny of a large number of natural and synthetic materials, including manure and nitrogen, phosphorus and potassium compounds, spread on or worked into soil to increase its fertility." Ex. 24 at 504; Ex. 25 at 457 (defining "fertilizer" as "a substance (as manure or a chemical mixture) used to make soil more fertile").

Through this comprehensive regulatory regime and otherwise,[12] Oklahoma actively encourages the use of poultry litter as a fertilizer. Oklahoma even operates an "Oklahoma Litter Market" to assist farmers in using poultry litter as a fertilizer. Ex. 26. Oklahoma admits that "litter can be utilized as a fertilizer for pastureland, cropland and hay production," Ex. 27, and also provides a "Fertilizer Value Calculator" to "calculate [the] value of nutrients in litter," Ex. 28.

Plaintiffs' own expert witnesses and employees have described how poultry litter provides soil nutrients, increases crop yields, and even outperforms commercial fertilizers. For example, OSU Professor Dr. Hailin Zhang, Oklahoma's leading authority on poultry litter, has detailed how "[p]oultry litter not only increased forage yields but also increased protein content over control and commercial fertilizer plots." Ex. 13 at 2 ("Higher yields and protein content . . . may result from the fact that litter provides a slow release nitrogen fertilizer, improves soil quality, and reduces soil acidity.").[13] Plaintiffs' expert, Dr. Gordon Johnson, agrees that soil can benefit from nutrients and organic matter in poultry litter regardless of the soil's phosphorous content, P.I.T. at 557:11-562:6 (Ex. 12), and that poultry litter is a fertilizer, *id.* at 606:11-606:19. Accordingly, growers, farmers, and ranchers in the IRW commonly and intentionally spread poultry litter on their land as a fertilizer. *See id.* at 1372:2-9 (Testimony of Randall Robinson). Oklahoma inspection officials agree. *See, e.g.*, Berry Dep. at 98:5-11 (cattle ranchers use poultry litter as fertilizer) (Ex. 31); Littlefield Dep. at 120:16-121:8 (many cattle ranchers and hay farmers believe that poultry litter works better than commercial fertilizer) (Ex. 14). Little wonder, then, that General Edmondson himself has acknowledged that poultry litter "is an effective fertilizer when properly used." P.I.T. at 36:9-12 (Ex. 12).

[12] *See, e.g.*, Undisputed Facts ¶¶ 14-16.

[13] *See also* Ex. 29 at 1 ("Manure provides nitrogen (N), phosphorus (P), potassium (K), calcium, magnesium, micronutrients and organic matter" for the soil."); Parrish Dep. at 217:18-218:5 (agreeing that poultry litter can perform better than commercial fertilizer) (Ex. 30).

B. Poultry Litter Use in the IRW is "Normal"

CERCLA only applies to fertilizer if the particular application is abnormal. 42 U.S.C. § 9601(22)(D). Neither CERCLA nor any other federal statute defines the "normal application of fertilizer."[14] The terms "fertilizer" and "normal" therefore take their ordinary and natural meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). To be "normal" means "conforming, adhering to, or constituting a usual or typical pattern, level, or type." Ex. 24 at 930; *see* Ex. 25 at 806 ("according with, constituting, or not deviating from a norm, rule, or principle"); Ex. 32 at 1059 (same); *see also South Penn Oil Co. v. Comm'r of Internal Revenue*, 17 T.C. 27, 50 (1951) (adopting *Webster's* definition); *R.R. Comm'n v. Konowa Operating Co.*, 174 S.W.2d 605, 609 (Tex. Civ. App. 1943) (same). Whether application is "normal" thus turns on whether it departs substantially from the "usual or typical" manner in which poultry litter is used as a fertilizer.[15]

Plaintiffs make no claim that the application of poultry litter in the IRW deviates from the usual or typical way poultry litter is applied (either within Oklahoma or elsewhere). They have not developed any evidence that any grower under contract with any particular Defendant applies

[14] The legislative history on this issue is not helpful, as numerous courts have recognized that legislative history is of little value in interpreting the provisions of CERCLA. *See Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1998) (citing authorities); *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993) ("[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."); *U.S. v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (CERCLA's "legislative history is unusually riddled by self-serving and contradictory statements"). In fact, courts have recognized that "no committee or conference reports address the version of the legislation that ultimately became law. It was only last minute, unrecorded compromises and acceptance of deliberate ambiguity in some of the bill's more controversial provisions that permitted the legislation's passage." *Carson Harbor Village v. Unocal Corp.*, 270 F.3d 863, 885 n.14 (9th Cir. 2000).

[15] No court has provided a definition of CERCLA's exception for the "normal application" of fertilizer. In *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003), however, the plaintiffs alleged that the air emission of ammonia from poultry litter into the environment was a CERCLA-covered release. At the plaintiffs' urging, the district court construed their complaint narrowly to exclude emissions from any land-applied poultry litter in order to avoid CERCLA's exception for the "normal application of fertilizer." *Id.* at 714.

litter in a manner different from common agricultural practice. Nor have they developed any evidence that the historical use of poultry litter within the IRW deviated from common practice. In fact, Oklahoma and Arkansas both comprehensively regulate litter application, *see* Undisputed Facts ¶ 16, dictating who may apply litter, what training they must receive, where they may do so, under what conditions and in what amounts for each individual parcel of land.[16]

The undisputed facts confirm that growers, farmers, ranchers and applicators in the IRW apply poultry litter in conformance with these laws and regulations. *See* Undisputed Facts ¶ 17; *see, e.g.*, Littlefield Dep. at 23:19-21 (no "bad actors" among farmers he inspects) (Ex. 14); *id.* at 43:3-11 (growers take a responsible approach to litter management); Phillips Dep. at 63:18-23 (not aware of any grower violating waste management requirements) (Ex. 15); P.I.T. at 1301:6-1303:8 (Testimony of Jesse Randall Young) (not aware of any widespread non-compliance or violations of Arkansas laws and regulations) (Ex. 12); *id.* at 2002:7-14 (Testimony of John Littlefield) (all growers inspected have in place phosphorus based animal waste plans); *id.* at 2006:12-15 (not aware of any growers discharging poultry wastes into the waters of Oklahoma). Farmers and ranchers spread the litter on the land as a fertilizer, and have always done so. *See, e.g.*, Littlefield Dep. at 40:8-42:17 (Ex. 14). Similarly, litter applicators, who are hired to apply litter to fields and pastureland, testified that they apply litter at consistent rates which are determined by state regulations in the IRW. *See, e.g.*, Traylor Dep. at 11:16-12:11 (Ex. 33); *see also* Berry Dep. at 184:13-185:17 (landowners must obtain a soil test for their fields before commercial litter applicators can apply litter) (Ex. 31).

[16] *See, e.g.*, 2 Okla. Stat. §§ 10-9.17-9.18 (requiring persons who apply poultry litter to obtain state certification and file an annual report on litter applied during the previous year); 2 Okla. Stat. § 10-9.7 (requiring operators of registered poultry feeding operations to complete mandatory education); 2 Okla. Stat. §§ 10-9.19-9.19(a) (mandating applicators' compliance with applicable animal waste management plan or conservation plan); 2 Okla. Stat. § 10-9.7 *et seq.* ("Best Management Practices – Requirement of Animal Waste Management Plans").

Rather than offer evidence of deviations from the "normal" application of poultry litter, the only testimony Plaintiffs sponsor regarding litter application rates is the opinion of their retained consultant, Dr. Gordon Johnson, that poultry litter *ought* to be applied in a manner *different from* prevailing practice. *See* Ex. 20 at ¶¶ 5b, 7a (arguing that litter application to fields measuring STP-65 or higher is not an "agronomically reasonable practice" and should be discontinued). But Dr. Johnson's testimony goes only to what he believes to be a "proper" or "desirable" rate, not to what is "normal." Indeed, he admits that he disagrees with both prevailing federal guidance and controlling state laws, *see* P.I.T. at 579:25-580:21 (Ex. 12), and that state and federal regulators have already rejected his theories, *see id.* at 580:22-581:12; Johnson Dep. at 62:11-64:25, 85:13-21 (Ex. 34). He cannot identify a single location where his methods are the norm, or another soil expert who agrees with his opinions. *See* P.I.T. at 577:13-580:10 (Ex. 12). Dr. Johnson's personal views do not define the "normal" application of fertilizer for purposes of CERCLA.

Based on their *opinion* that the long-standing and consistent use of poultry litter as a fertilizer in the IRW has caused environmental harm, Plaintiffs would have this Court rewrite the exception provided by Congress for the "normal" application of fertilizer to an exception that accommodates Dr. Johnson's unique perspective on what is the *appropriate* application of fertilizer. Plaintiffs' interpretation of the fertilizer exception must fail. Plaintiffs' theory is inconsistent with the plain language of CERCLA and the common usage of the term "normal." Simply because Plaintiffs disagree with the long-standing practice of applying litter as a fertilizer does not render that practice "abnormal." In fact, the same consistent and long-standing use of poultry litter that Plaintiffs allege has resulted in environmental harm makes these fertilizer applications "normal" and therefore not within CERCLA's scope. *See* SAC ¶¶ 1, 47-52

(alleging longstanding knowledge). Because poultry litter is applied in the IRW as fertilizer in the normal manner, Plaintiffs cannot demonstrate a "release" of hazardous substances. The Court should therefore grant judgment as a matter of law on Plaintiffs' CERCLA claims.

III. PLAINTIFFS HAVE NOT IDENTIFIED A PROPER CERCLA "FACILITY"

In order to prevail, Plaintiffs must prove that a hazardous substance was released from or into a CERCLA "facility." 42 U.S.C. § 9607(a); *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005). CERCLA establishes a "two-part disjunctive" definition of "facility," *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1171-72 (10th Cir. 2004), as follows:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).[17] This definition covers both the specifically-listed types of properties as well as "every place where hazardous substances come to be located." *Seaboard Farms*, 387 F.3d at 1171-72 (quotations omitted). Plaintiffs propose two descriptions of their alleged facility: first,

> The IRW, including the lands, waters and sediments therein, constitutes a "site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . . ." and, as such, constitutes a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9).

SAC ¶ 71; and second,

> Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which poultry waste has been applied, also constitute a "facility" within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the "releases" and/or "threatened releases" of "hazardous substances" into the IRW, including the lands, waters and sediments therein, resulted.

[17] Because poultry litter is a useful and valuable commodity, it qualifies as a "consumer product in consumer use" under this definition and is therefore not itself a CERCLA facility.

SAC ¶ 80. Neither alleged facility is legally sufficient. Plaintiffs' primary contention—that the entire 1,069,530-acre IRW constitutes a single facility—is fatally overbroad as neither the statute nor any judicial application thereof embraces such a far ranging "facility," capturing extensive non-impacted lands and entirely divorced from any bounds of alleged contamination. Plaintiffs' alternative theory—that numerous noncontiguous facilities can be agglomerated into one CERCLA super-facility—fails both because the statute expressly prohibits such an exercise, and because Plaintiffs have failed to identify the locations of these alleged individual facilities.

A. The Entire IRW is Not a Facility Within the Meaning of CERCLA

Plaintiffs assert principally that the entire 1,069,530-acre IRW constitutes a single CERCLA facility.[18] The alleged facility thus spans portions of six counties in two states engulfing at least thirteen cities.[19] A properly delineated CERCLA "facility" focuses the assessment of liability, damages, and joint and several responsibilities by establishing a nexus between particular sources of pollution, contaminated sites, and individuals and businesses associated with them. *See, e.g., New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999); *United States v. Iron Mtn. Mines, Inc.*, 987 F. Supp. 1263, 1270 (E.D. Cal. 1997). But here, Plaintiffs' asserted facility includes vast swaths of land that could not possibly be

[18] *See, e.g.*, Feb. 26, 2007 Op. and Order, Dkt. No. 1061 at 2 ("Plaintiff made clear … that the 'facility' asserted is the entire [IRW.]"). While the Court held previously that these allegations were sufficient to clarify the contours of Plaintiffs' claim, the Court declined to address "whether or not a facility consisting of 1,000,000 acres is contemplated by the statute." *Id.* at 3. In fact, the Court has repeatedly expressed skepticism as to whether the one million-plus acre IRW can constitute a CERCLA facility. *See, e.g.*, June 15, 2007 Hearing Tr. at 52:20-53:3 ("I have a serious question in my mind . . . of whether or not a facility consisting of a million acres is contemplated by the statute . . . . I've got a serious question as to whether or not CERCLA even applies in this situation . . . .") (Ex. 35).

[19] *See* SAC ¶ 21; SAC at Ex. 1. While Plaintiffs concede their lack of standing to recover for alleged injuries in the State of Arkansas, Plaintiffs have made no similar concession regarding the expanse of the alleged CERCLA facility at issue. Accordingly, Plaintiffs continue to claim that their CERCLA "facility" includes over half a million acres of land in Arkansas.

impacted by poultry litter,[20] and sweeps up numerous releases of alleged "hazardous substances" from multiple other sources entirely unrelated to poultry farming.[21] Such an indiscriminately drawn facility confounds any effort to accurately trace alleged injuries to their actual cause(s). The alleged facility is thus legally deficient.

1. The entire IRW fails to satisfy the statutory definition of a CERCLA facility

As noted, CERCLA provides alternate definitions of "facility." 42 U.S.C. § 9601(9). Plaintiffs' allegation that the entire IRW is a single facility does not satisfy the first. 42 U.S.C. § 9601(9)(A).[22] Therefore, Plaintiffs must satisfy subpart B, which defines the CERCLA facility by the geographic location of the allegedly released hazardous substances. 42 U.S.C. § 9601(9)(B) (defining "facility" as the "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."). This "includes every place where hazardous substances come to be located." *Seaboard Farms*, 387 F.3d at 1172. It also, therefore, excludes those places where hazardous substances have *not* "come to be

[20] *See* Ex. 1 at 25 ("The land area of the Illinois River watershed is a complex patchwork of urban, rural residential, agricultural, and forest land uses."); *id.* at Figure 3.1. Land use data for the IRW indicates that only 494,000 acres of the 1,069,530 acre watershed is readily available for equipment access for farming. *See* Ex. 11 at 9.

[21] *See*, *e.g.*, Third Party Complaint, Dkt. No. 80 (Oct. 4, 2005) (listing landowners and land users contributing materials to the IRW); Cargill's Third Party Complaint, Dkt. No. 82 (Oct. 4, 2005) (same); Ex. 1 at 25 ("Land application of poultry litter is only one among many potential sources. The most important sources of P to stream water are probably waste water treatment plant effluent, livestock, septic systems, erosion, and runoff from urban and other developed areas. The most important sources of fecal indicator bacteria are probably livestock, septic systems, urban runoff, accidental sewage discharge and other sewage bypasses, river recreationists, and wildlife.").

[22] Subpart (A) includes "any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft." Subpart (A) applies only to the type of examples delineated therein and not to any combination thereof. *Seaboard Farms*, 387 F.3d at 1170-72. Moreover, Plaintiffs have failed to identify, let alone prove the existence of, the alleged individual facilities or releases comprised by their CERCLA claim.

located." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842-43 (4th Cir. 1992) ("the only 'area' where hazardous substances have 'come to be located' is in and around the storage tanks, so the relevant 'facility' is properly confined to that area [even though] the tanks are a part of the larger piece of property that is now the Nurad site").

Plaintiffs agree that the "words of the statute suggest that the bounds of a facility should be defined by the bounds of the contamination." Pls.' Opp. to Mot. for More Definite Statement, Dkt. No. 131 at 5 (Nov. 18, 2005) (quoting *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998)). Despite this admission, the only bounds Plaintiffs propose are the IRW's own borders, which are set without reference to any alleged contamination, and certainly without regard to the land application of poultry litter. Indeed, Plaintiffs have developed no evidence to demonstrate where hazardous substances have "been deposited, stored, disposed of, or placed, or otherwise come to be located" in the IRW, or to support their necessary contention that contamination has spread throughout the entire alleged facility. *See* Undisputed Facts ¶¶ 20-22.[23] To the contrary, the undisputed facts prove that the IRW consists of thousands of individual parcels of land, the vast majority of which are not impacted by the land application of poultry litter. *See supra* note 20; Undisputed Facts ¶ 19. Plaintiffs have therefore failed to define a CERCLA-covered "facility."

2. Courts have uniformly rejected overbroad definitions of CERCLA facilities

Courts have rejected alleged facilities comprising expansive geographic areas and significant non-impacted areas. For example, *New Jersey Turnpike Auth.*, 197 F.3d 96, was a

[23] This is not surprising given Plaintiffs' refusal to follow CERCLA's process for identifying and investigating releases or threatened releases of hazardous substances. *See* 42 U.S.C. § 9605(a). EPA counsels "remedial site evaluation" followed by "remedial investigation." 40 C.F.R. §§ 300.420, 300.430. But here, as in *New Mexico v. General Electric*, 467 F.3d 1223, 1235 (10th Cir. 2007), Plaintiffs rejected a preliminary assessment in favor of immediate litigation.

case involving seven specific contaminated areas near the Turnpike, but the plaintiff nevertheless alleged that the Turnpike's entire eastern spur constituted a single facility. *See id.* at 105. The Third Circuit disagreed, holding that "allowing the 'facility' to be the entire eastern spur, where the Turnpike's claim seeks costs relating to seven specific sites, would result in an unwarranted relaxation of the 'nexus' required" to show that each defendant caused the contamination in the alleged facility. *Id.* Other courts have reached similar conclusions. *See, e.g., Iron Mtn. Mines,* 987 F. Supp. at 1270 (rejecting definition of "the 'facility' [as] the entire Sacramento River basin above Keswick Dam", rather than the narrow cleanup site of Iron Mountain Mine, because "these arguments flounder on the minimal causation requirement in CERCLA").[24]

Here, Plaintiffs' purported facility consists of unknown thousands of properties used for a multitude of purposes and owned by private residents, farmers, business owners, municipalities, and Indian tribes, not to mention the federal and state governments. By making no effort to identify where poultry litter has "been deposited, stored, disposed of, or placed, or otherwise come to be located," a facility of this scope confounds any effort to establish individual responsibility for particular releases and resulting injuries (if any), thus eviscerating CERCLA's minimum causation requirements. *See New Jersey Turnpike Auth.*, 197 F.3d at 105; *Iron Mtn. Mines, Inc.*, 987 F. Supp. at 1270.

3. Plaintiffs' overbroad "facility" lacks any basis in caselaw

A CERCLA facility need not match perfectly the contours of the alleged pollution. *See Township of Brighton*, 153 F.3d at 312. Nevertheless, while the term "facility" has been applied broadly," *Seaboard Farms*, 387 F.3d at 1174 (citing cases), it imposes discernable and established limitations on the inclusion of non-polluted lands.

[24] *See also In re: Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 51781, *16-20 (S.D.N.Y. July 8, 2007).

Uncontaminated areas may be incorporated into a larger CERCLA facility where the contaminated and uncontaminated land was subject to homogeneous use, ownership, or control. For example, *Township of Brighton*, 153 F.3d 307, regarded a single 15-acre property where only three acres were contaminated by hazardous substances. In treating the property as a single facility the Sixth Circuit noted that the owner "used the entire property as a dump, and so it is appropriately classified as a single facility." *Id.* at 313.[25] Moreover, uncontaminated properties may be included in a CERCLA facility only where they "cannot be reasonably or naturally divided into multiple parts or functioning units." *Township of Brighton*, 153 F.3d at 313; *see also Niagara Mohawk Power Corp. v. Consolidated Rail Corp.*, 291 F. Supp. 2d 105, 125 (N.D.N.Y. 2003) ("where parcels are naturally divisible into parts or functional units, they should not be considered as a single facility"). Accordingly, under even the broadest definition of "facility" the IRW, with its tens of thousands of separate properties and uses, cannot possibly constitute a single CERCLA facility.

Courts have only permitted separate and divisible properties to be incorporated into the same facility if the evidence establishes that the contamination from the original source has migrated to *contiguous* off-site areas, such that the *entire* facility consists of property on which hazardous substances have "been deposited, stored, disposed of, or placed, or otherwise come to be located." For example, in *United States v. Vertac Chem., Corp.*, 364 F. Supp. 2d 941 (E.D. Ark. 2005), the court permitted the facility to include "off-site areas, such as the "soils, the floodplains and stream sediments of Rocky Branch Creek and Bayou Meto, sanitary sewer lines,

[25] *See also Seaboard Farms*, 387 F.3d at 1168, 1174 (defining facility to include "two farms located on contiguous sections of land" that were "[s]olely owned by Seaboard, [and] managed and operated as one facility, with one particular site purpose"); *U.S. v. 150 Acres of Land*, 204 F.3d 698, 709 (6th Cir. 2000) (defining facility to include three contiguous parcels of land owned and operated by the same entity); *Sierra Club*, 299 F. Supp. 2d at 708-711 (defining "[a] whole chicken farm site [as] a facility . . . under CERCLA", rather than "each poultry house").

and two municipal sewer plants and their structures," because it was undisputed that "the contamination from the Site migrated to the *contiguous* off-site areas." *Id.* at 960 (emphasis added).[26] But, as established in *New Jersey Turnpike Auth.*, 197 F.3d at 105, this definition does not extend to circumstances, such as here, where the allegedly contaminated properties are *noncontiguous* properties within a broader area and no evidence establishes that contamination has "come to be located" throughout the entire purported facility.

B. Plaintiffs Have Failed to Establish the Existence of Any Other Alleged Facility Within the Meaning of CERCLA

Plaintiffs separately allege that "the grower buildings, structures, installations and equipment, as well as the land to which poultry waste has been applied" constitute the "'facility' from which the 'releases' and/or 'threatened releases' of 'hazardous substances' into the IRW" occurred. SAC ¶¶ 71, 80. This alternative theory also fails to describe a permissible "facility."

1. Plaintiffs cannot combine multiple noncontiguous and separate facilities into one super-facility under CERCLA

Plaintiffs' (slightly) more narrow definition is first barred by the plain text of the statute. CERCLA expressly permits *the federal government*, in its sole discretion, to treat noncontiguous and geographically separate lands as a single CERCLA facility. *See* 42 U.S.C. § 9604(d)(4). The inclusion of this specific authority precludes its exercise by litigants other than the federal government. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002) (*expressio unius est exclusio alterius*); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-169 (1993) (same). Statutes must be construed so as to give meaning to each term and provision. *See Begay v. United States*, 128 S. Ct. 1581, 1585 (2008); *Leocal v.*

[26] *See also Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 417 (4th Cir. 1999) ("[The definition of a facility] applies not only to traditional waste sites … but also to any 'area' in and around which hazardous substances have 'come to be located . . . .'" (citations and internal quotations omitted)).

Ashcroft, 543 U.S. 1, 12 (2004). To conclude that any litigant may allege a composite facility would render meaningless the President's specific authority to do so under 42 U.S.C. § 9604(d)(4). Accordingly, Plaintiffs cannot gather noncontiguous and separate lands and structures into a single super-facility. *See*, *e.g.*, *New Jersey Turnpike Auth.*, 197 F.3d at 105.

2. Plaintiffs have not identified the locations of the purported facilities comprising the alleged super-facility

Even if Plaintiffs were permitted to pursue their alternate definition, their claims would still fail because Plaintiffs have not identified the specific locations, farms, or land application sites that constitute their alleged super-facility, or the locations of any alleged releases or threatened release of purported hazardous substances. *See* Undisputed Facts ¶¶ 20-22. Rather, Plaintiffs have simply asserted that the Defendants have "ample knowledge as to where the poultry [litter] . . . has been deposited, stored, disposed of, or placed," and that the Defendants have "ample knowledge as to where the poultry [litter] . . . has ultimately otherwise come to be located." Pls.' Opp. to Mot. for More Definite Statement, Dkt. No. 131 at 6-7 (Nov. 18, 2005). But at the summary judgment stage, Plaintiffs may no longer shift their burden of proof, but must themselves adduce admissible evidence in support of their alleged facility. Plaintiffs have failed to come forward with evidence to identify the individual locations that supposedly constitute their "super facility," and as such Defendants are entitled to judgment as a matter of law.

CONCLUSION

This is simply not a CERCLA case. Plaintiffs have failed to adduce any evidence of damages or response costs for environmental injuries in the IRW allegedly caused by the release or threatened release of "hazardous substances" within the meaning of CERCLA. In addition, Plaintiffs have failed to define a CERCLA "facility" as a matter of law. Therefore, summary judgment should be granted on Counts 1 and 2 of the Second Amended Complaint.

Respectfully submitted,

BY: *__/s/ Jay T. Jorgensen__*

Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY:____/s/*James M. Graves*_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY:____*/s/ A. Scott McDaniel*_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,

GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

ATTORNEYS FOR PETERSON FARMS, INC.

BY: */s/ R. Thomas Lay*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

R. Thomas Lay, OBA #5297
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
Telephone: (405) 272-9221
Facsimile: (405) 236-3121

-and-

Jennifer S. Griffin
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101
Telephone: (573) 893-4336
Facsimile: (573) 893-5398

ATTORNEYS FOR WILLOW BROOK FOODS, INC.

BY: */s/ John R. Elrod*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk

CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553
ATTORNEYS FOR SIMMONS FOODS, INC.

BY: */s/ Robert P. Redemann*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136
ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: */s/ John H. Tucker*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600
ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

CERTIFICATE OF SERVICE

I certify that on the 18th of February, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	daniel.lennington@oak.ok.gov
Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	
J. Randall Miller	rmiller@mkblaw.net
Louis W. Bullock	lbullock@bullock-blakemore.com
Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	
COUNSEL FOR PLAINTIFFS	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com

Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Gordon D. Todd gtodd@sidley.com
Sidley Austin LLP

Robert W. George robert.george@tyson.com

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks
Paul E. Thompson, Jr. pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Jennifer E. Lloyd jlloyd@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker jtuckercourts@rhodesokla.com
Leslie J. Southerland ljsoutherlandcourts@rhodesokla.com
Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thillcourts@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann Kleibacker Lee kklee@baegre.com
Dara D. Mann dmann@faegre.com
Todd P. Walker twalker@faegre.com
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves mgraves@hallestill.com
D. Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman wfederman@aol.com
Jennifer F. Sherrill jfs@federmanlaw.com
Federman & Sherwood

Charles Moulton charles.moulton@arkansag.gov
Jim DePriest jim.depriest@arkansasag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith griffithlawoffice@yahoo.com
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

Gary S. Chilton gchilton@hcdattorneys.com
Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz vschwartz@shb.com
Cary Silverman csilverman@shb.com
Shook, Hardy & Bacon, LLP

Robin S. Conrad rconrad@uschamber.com
National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford fordr@crowedunlevy.com
LeAnne Burnett burnettl@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins richard.mullins@mcafeetaft.com
McAfee & Taft

James D. Bradbury jim@bradburycounsel.com
James D. Bradbury, PLLC
COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

/s/ *Jay T. Jorgensen*